

CCDLA
"Ready in the Defense of Liberty"
Founded 1988

**Connecticut Criminal Defense
Lawyers Association**
P.O. Box 1766
Waterbury, CT 07621-1776
(860) 283-5070 Phone/Fax

www.ccdla.com

Edward J. Gavin, Esq.
Past President-CCDLA
Meehan Meehan & Gavin
76 Lyon Terrace
Bridgeport, Connecticut 06604

March 16, 2010

Judiciary Committee Public Hearing

RAISED BILL NO. 5503
AN ACT CONCERNING INVESTIGATIVE SUBPOENAS FOR
PROPERTY
March 17, 2010

TESTIMONY OF EDWARD J. GAVIN, INDIVIDUALLY,
AND AS PAST PRESIDENT OF THE CONNECTICUT
CRIMINAL DEFENSE LAWYERS ASSOCIATION, IN
OPPOSITION TO RAISED BILL NUMBER 5503- AN ACT
CONCERNING INVESTIGATIVE SUBPOENAS FOR
PROPERTY

Chairman McDonald, Chairman Lawlor, and Distinguished Members of the
Judiciary Committee:

The Connecticut Criminal Defense Lawyers Association (CCDLA) is a statewide organization of approximately 350 licensed lawyers, in both the public and private sectors, dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA works to improve the criminal justice system by ensuring that the individual rights guaranteed by the Connecticut and United States constitutions are applied fairly and equally and that those rights are not diminished. At the same time, CCDLA strives to improve and suggest changes to the laws and procedures that apply to criminal justice.

**CCDLA OPPOSES THE ENACTING OF RAISED BILL 5503
PROVIDING THE OFFICE OF THE STATES ATTORNEY
AUTHORITY TO ISSUE INVESTIGATIVE SUBPOENAS FOR
RECORDS OR OTHER PROPERTY**

CCDLA opposes providing the Office of the State's Attorney authority to issue investigative subpoenas at their discretion in the investigation of criminal cases. The investigatory subpoena process will allow members of the State's Attorneys office unfettered authority to demand the production of private records and other private property without any Judicial oversight. The issuance of Investigatory Subpoenas in criminal cases is in contravention to the well established Constitutional practice of applying to the Courts for lawful permission to execute Search Warrants **AFTER** establishing to the issuing neutral Magistrate that there is probable cause to grant the search warrant. Investigatory subpoenas **DO NOT** require that probable cause be established for the records sought but only that the "Prosecuting Official" seeks the records if they feel it is relevant to any investigation.

The process as proposed is ripe for abuse allowing the Chief State's Attorney, a deputy Chief States Attorney, *or any other State's Attorney* to go on fishing expeditions for confidential, private information at the expense of the privacy of the citizens of Connecticut. This proposed process is in direct conflict to the State and Federal constitutional Due Process guarantees.

RELEVANT HISTORY:

During the 2009 legislative session, the Connecticut Criminal Defense Lawyers Association was asked by Chairman Lawlor to meet with the Office of the Chief State's Attorney to discuss grand jury reform. President Elect Jennifer Zito and the undersigned discussed this with Chief State's Attorney Kevin Kane with the thought that we would meet prior to the 2010 legislative session regarding grand jury reform. The discussions

regarding grand jury reform never occurred. CCDLA was subsequently advised by members of the Connecticut Bar Association that the State's Attorney's Office was now seeking authority for an investigative subpoena. A meeting was held in Waterbury on Wednesday, February 24, 2010 with Chief State's Attorney Kevin Kane and Deputy Chief State's Attorney Len Boyle. We explained the history of grand jury reform to Attorney Boyle. We indicated on behalf of CCDLA that we were not provided the opportunity to discuss the proposed legislation on investigatory subpoenas. We indicated that if the bill regarding investigatory subpoenas was raised that we would provide our opposition to the Judiciary Committee.

CCDLA is still committed to discuss grand jury reform with the Office of the Chief State's Attorney.

SPECIFIC FLAWS IN RAISED BILL NO. 5503:

CCDLA has a number of objections to the proposed legislation. As drafted, the legislation will circumvent the search and seizure warrant process which is an integral part of Connecticut Criminal Procedure. The State's Attorney's Office will have the ability to obtain property including documents, books, papers, records, films, and other tangible property such as computers, merely by executing a subpoena. The investigatory subpoena power is overly broad, unreasonable in time, and subject to abuse.

The CCDLA would ask the Judiciary to consider the following specific comments:

1. The act will permit the investigation of virtually any crime. Although Section 1 delineates specific statutory offenses, a prosecutor would have to only justify a generalized investigation to issue a subpoena.
2. The proposed legislation would affect virtually all citizens of Connecticut in their individual capacity, as well as members of firms, partnerships, limited liability partnerships or corporations, custodians, trusts, estates and syndications. The proposed legislation would allow a state's attorney to obtain any and all records merely by representing that they were investigating the commission of a crime.
3. The "prosecuting official" is defined as the chief state's attorney, a deputy chief state's attorney, or a state's attorney. There is no centralized authority for the issuance of investigatory subpoenas. Law enforcement officials would not have to report their efforts to any centralized authority. What would constitute the investigation into a "crime" in one judicial district will very much vary in another judicial district. There will be lack of uniformity in the judicial districts.
4. If the Office of the State's Attorney is granted the authority for investigatory subpoenas for property, it is the opinion of the undersigned that they would never be required to apply for search warrants in the future. A search warrant requires a probable cause determination by an issuing magistrate. The investigatory subpoena would remove this oversight and allow law enforcement officials unlimited discretion in obtaining records.
5. It is clear that this is the first step by the State's Attorney's Office to seek authority for the production of property. The next step will be a request by the Chief State's Attorney's Office for authority to compel testimony, circumventing the established grand jury process. There is no doubt in the undersigned's mind that the Judiciary Committee will be approached in the near future indicating that law

enforcement officials could do a much more effective job if they had the ability to compel testimony.

An argument has been raised that other agencies, such as the banking commissioner, have the right to compel the production of documents by subpoena. This authority is in fact correct. The difference is that other agencies do not conduct investigations for criminal purposes. They do not have arrest powers. That authority vests with the State's Attorney's Office. Administrative investigations by their definition are different than criminal investigations. Criminal investigations impact liberty rights of citizens and implicate constitutional protections.

It is not realistically plausible to believe that the State's Attorney's Office will be able to conduct large scale investigations. That ability vests with the federal government. It is unrealistic, in these difficult financial times, to believe that the State's Attorney's Office will become staffed with investigators to conduct large scale investigations. The reality is that the state's attorneys in the various judicial districts will use the investigative subpoena powers to conduct investigations into small scale criminal activity.

Proposed Section 7 allows a subpoenaed individual to file a motion to quash the subpoena. In reality, courts give great deference to subpoenas. Historically, courts will not grant motions to quash subpoenas. This puts the investigating agency at a great advantage.

Although the Bill is entitled An Act Concerning Subpoenas for Property, there is a component under Section 4 where a subpoena Ad Testificandum may be issued for a hearing determining the scope of the response to the subpoena. Under Section 5, a prosecuting official may also apply to a judge of the superior court for an order granting immunity from prosecution for any individual whom the state calls or intends to call as a witness to authenticate property or to establish compliance with the subpoena. This broad authority goes far beyond the stated purpose of the Bill to protect state residents and government funds from fraud.

A state's attorney already lawfully possesses the power to subpoena witnesses to criminal trials. The proposed Bill does not limit the authorizations to a specific case and basically becomes a "general warrant" in violation of Article I, Section 8 of the Connecticut Criminal Constitution, as well as the Fourth Amendment to the United States Constitution. Section 6 of the proposed legislation also provides for the production of medical, psychiatric and substance abuse treatment records which are privileged and confidential. These records should only be produced by court order after a showing of necessity.

CONCLUSION:

CCDLA opposes Raised Bill 5503, an act concerning subpoenas for property.

The proposed legislation provides the State's Attorney's Office with overly broad powers in violation of State and Federal Constitutional protections. This legislation is the first step by the State's Attorney's Office to seek authority for the production of records and

testimony at their discretion. It is a clear attempt to contravene the grand jury system. There is no doubt that the legislation should not be supported. It places the privacy interests of the citizens of Connecticut at great risks. There is no limitation in regard to the investigations. The Bill would provide unreasonably broad powers to the State to subpoena individuals to produce property in cases where there are no pending criminal cases. The authority to issue the subpoenas is not centrally established. The standards for the investigation will vary from judicial district to judicial district. The legislation seeks authority to obtain privileged and confidential records. The legislation clearly impedes on the privacy interests of the citizens of Connecticut and should not be supported.

Respectfully submitted,

A handwritten signature in black ink, reading "Edward J. Gavin". The signature is written in a cursive, flowing style with a prominent "E" and "G".

EDWARD J. GAVIN
Individually and as PAST
PRESIDENT of the
Connecticut Criminal Defense
Lawyers Association